

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JEFFERY VALE, et al.,

Plaintiffs,

v.

CITY OF SEATTLE, et al.,

Defendants.

Case No. 2:23-cv-01095-TLF

ORDER DENYING IN PART AND
GRANTING IN PART PLAINTIFFS'
MOTION FOR LEAVE TO FILE A
SECOND AMENDED COMPLAINT

On June 18, 2024, the Court denied in part and granted in part Defendants' motion to dismiss Plaintiffs' amended complaint. Dkt. 58. Specifically, the Court denied Defendants' motion to dismiss the following claims: (1) procedural due process, (2) First Amendment Free Exercise, Due Process, and Equal Protection regarding the Defendants' unwritten customs or practices, or an as-applied challenge (3) arbitrary and capricious action; (4) public policy; (5) and failure to accommodate. The Court granted Defendants' motion to dismiss: (1) Plaintiffs' Takings Clause claim under the Fifth Amendment, (2) wage theft claim, (3) claim under the First Amendment Free Exercise Clause regarding the facial validity of the Defendants' formal policy, and (4) breach of contract claim. *Id.*

The Court found it "appropriate to allow Plaintiffs to file a motion for leave to amend their breach of contract claim *only*," and specifically denied leave to amend on Plaintiffs' Takings Clause claim, wage theft claim, and Free Exercise claim regarding

1 whether the formal policy of the City and Fire Department was facially valid under the
2 First Amendment. *Id.* at 26-27 (emphasis added). The Court instructed Plaintiffs to file
3 their motion for leave to amend by July 2, 2024.

4 Plaintiffs filed a motion for leave to file a second amended complaint. Dkt. 60.
5 Plaintiffs, in their motion, seek to add two additional defendants (i.e., Governor Jay
6 Inslee and State Attorney General Robert Ferguson) and new claims, including a 42
7 U.S.C. § 1985 conspiracy claim, a 42 U.S.C. § 1981 claim, a constitutional Equal
8 Protection claim, and requests for injunctive relief. Dkt. 60. Plaintiffs further seek to
9 amend their breach of contract claim.

10 In its order, the Court stated it was granting Plaintiffs leave to amend one claim,
11 and only one claim – the breach of contract claim.

12 In the instant motion, Plaintiffs have addressed the Court's order in their
13 amendment of the breach of contract claim by referring to specific terms of the
14 Collective Bargaining Agreement, i.e., the contract allegedly breached by Defendants.
15 Defendants argue because Plaintiffs have not alleged that they exhausted the grievance
16 and arbitration remedies under the collective bargaining agreement, this claim would be
17 dismissed.

18 Plaintiffs have identified a contractual provision that was allegedly breached, and
19 Plaintiffs have sufficiently stated a breach of contract claim at this stage.

20 Plaintiffs, in addition to the breach of contract claim, have sought to add new
21 defendants and several new claims. Defendants contend these amendments are
22 outside the scope of the Court's June 18, 2024, Order (Dkt. 58), the Court's Order
23 Setting Forth Court Procedures (Dkt. 32), and the Pretrial Scheduling Order (Dkt. 33).

1 The district court has discretion to enforce the scheduling order and a motion to
2 amend the complaint must comply with Fed. R. Civ. P. 16. *See, Kamal v. Eden*
3 *Creamery, LLC*, 88 F.4th 1268, 1277-1279 (9th Cir. 2023) (diligence is the “focus of the
4 inquiry”); *but see, Bacon v. Woodward*, 104 F.4th 744, 753-755 (9th Cir. 2024) (majority
5 opinion holds the district court abused its discretion by denying a motion to amend, and
6 cites to case law that allows for liberal amendment; dissent points out there was a
7 scheduling order in place and Fed. R. Civ. P. 16 should have been adhered to).

8 The Court’s discretion is particularly broad when plaintiff has already amended
9 the complaint, and then there is a subsequent motion to amend. *World Wide Rush, LLC*
10 *v. City of Los Angeles*, 606 F.3d 676, 690 (9th Cir. 2010). The Court need not address
11 the legal standards of Fed. R. Civ. P. 15, unless plaintiff has complied with Fed. R. Civ.
12 P. 16 and shown diligence and good cause. *Johnson v. Mammoth Recreations, Inc.*,
13 975 F.2d 604, 607-608 (9th Cir. 1992); *but see, Bacon*, 104 F.4th at 753 (majority
14 opinion allows amendment under Fed. R. Civ. P. 15 even without a showing of diligence
15 and good cause under Fed. R. Civ. P. 16). A motion to amend a complaint is not a de
16 facto motion to amend a scheduling order. *See, Johnson*, 975 F.2d at 608-609.

17 In the Order Setting Forth Court Procedures, the Court instructs parties to
18 meaningfully meet and confer for *all* motions, except for dispositive motions. Dkt. 32 at
19 3. The moving party should include a certification within either the first substantive
20 paragraph or the final paragraph of the motion indicating that they have complied with
21 this requirement. The Court warns that motions that do not comply may be summarily
22 denied. In implementing a meet and confer requirement on all motions, the Court’s
23 intent is to further the goal of efficiency for the Court and litigants.

1 Here, given that the motion and proposed second amended complaint requests
2 to add new defendants and new claims, the Court's scheduling order anticipated the
3 parties would have met and conferred before Plaintiffs filed the motion. Defendants'
4 counsel submitted a declaration, attaching an email to Plaintiffs' counsel asking whether
5 Plaintiffs intended on filing a motion for leave to file a second amended complaint. Dkt.
6 62 (Declaration of Emma Kazaryan) at Exhibit D. Plaintiffs' counsel did not respond to
7 the email. *Id.* at ¶¶7-8.

8 Further, pursuant to the Court's scheduling order, Plaintiffs' deadline to amend
9 pleadings was February 9, 2024. Plaintiffs filed an amended complaint on February 8,
10 2024; the Court ruled on Defendants' subsequent motion to dismiss on June 18, 2024,
11 and granted Plaintiffs a narrowly defined scope of the allowed amendment.

12 For any other claims Plaintiffs sought to amend, Plaintiffs should have submitted
13 a motion for extension of the February 8, 2024 deadline, and complied with Federal
14 Rule of Civil Procedure 16.

15 Pursuant to Fed. R. Civ. P. 16(b)(4), a scheduling order may be modified for
16 good cause, and with the Court's consent. "Rule 16(b)'s 'good cause' standard primarily
17 considers the diligence of the party seeking the amendment." *Johnson v. Mammoth*
18 *Recreations*, 975 F.2d at 609. The Court may modify the pretrial schedule if the moving
19 party could not reasonably meet the deadlines despite the party's diligence. *Id.*

20 To demonstrate diligence under Rule 16's "good cause" standard, the movant
21 may be required to show the following:

- 22 (1) that he was diligent in assisting the court in creating a workable
23 Rule 16 order; (2) that his noncompliance with a Rule 16 deadline
24 occurred or will occur, notwithstanding his diligent efforts to comply,
because of the development of matters which could not have been

1 reasonably foreseen or anticipated at the time of the Rule 16
2 scheduling conference; and (3) that he was diligent in seeking
3 amendment of the Rule 16 order, once it became apparent that he
4 could not comply with the order.

5 *Kang v. Nationstar Mortg. LLC*, No. C23-5106-KKE, 2024 WL 2274316, at *1 (W.D.
6 Wash. May 20, 2024) (citing *Morgal v. Maricopa Cnty. Bd. of Supervisors*, 284 F.R.D.
7 452, 460 (D. Ariz. 2012)).

8 Here, Plaintiffs did not file a motion for extension of a deadline; they argue in the
9 motion to amend, that newly published opinions of the Ninth Circuit Court of Appeals
10 justify the adding of new claims and defendants, and the “interests of justice” will be
11 served by adding claims under “the Washington State statute and the Seattle ordinance
12 requiring termination to be only “for cause,”” and claims under the “federal Constitutional
13 right to equal protection under the 14th Amendment and 42 U.S.C. §§ 1983 and 1985,
14 and the federal statutory rights under 42 U.S.C. § 1981 to equality in the implementation
15 of contracts.” Dkt. 60 at 3-6, citing *Health Freedom Defense Fund, Inc. v. Carvalho*, 104
16 F.4th 715 (9th Cir. 2024) and *Bacon v. Woodward*, 104 F.4th 744 (9th Cir. 2024).

17 Plaintiffs failed to comply with the Court’s June 18, 2024, Order, the “meet and
18 confer” requirement in the Court’s standing order, and the February 8, 2024, deadline in
19 the scheduling order, yet the Court must follow recent Ninth Circuit precedent and
20 analyze Rule 15. *Bacon v. Woodward*, 104 F.4th at 753-754.

21 Pursuant to Federal Rule of Civil Procedure 15(a), after an initial period for
22 amendment as of right, pleadings may be amended only with the opposing party’s
23 written consent or by leave of the court. Leave to amend should be freely given when
24 justice so requires. Fed. R. Civ. P. 15(a)(2); *Bacon v. Woodward*, at 753; *Desertrain v.*

1 *City of Los Angeles*, 754 F.3d 1147, 1154 (9th Cir. 2014) (“[T]his policy is to be applied
2 with extreme liberality.”).

3 The Court considers five factors when determining the propriety for leave to
4 amend: bad faith, undue delay, prejudice to the opposing party, futility of amendment,
5 and whether the plaintiff has previously amended the complaint. *Desertrain*, 754 F.3d at
6 1154; *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004). For each of these
7 factors, the party opposing amendment has the burden of showing that amendment is
8 not warranted. *DCD Programs. Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987); see
9 also *Richardson v. United States*, 841 F.2d 993, 999 (9th Cir. 1988).

10 1. Bad Faith

11 In the context of a motion for leave to amend, “bad faith” means acting with intent
12 to deceive, harass, mislead, delay, or disrupt. *Leon v. IDX Sys. Corp.*, 464 F.3d 951,
13 961 (9th Cir.2006). Bad faith means more than acting with bad judgment or negligence,
14 but “rather it implies the conscious doing of a wrong because of dishonest purpose or
15 moral obliquity.... [I]t contemplates a state of mind affirmatively operating with furtive
16 design or ill will.” *United States v. Manchester Farming P’ship*, 315 F.3d 1176, 1185 (9th
17 Cir.2003).

18 Here, this factor favors allowing amendment. There is no evidence of “conscious
19 doing of a wrong ..., dishonest purpose or moral obliquity ..., [or] furtive design or ill will”.

20 *Id.* Defendants also do not point to any evidence of bad faith in their response.

21 Defendants only address the potential prejudice to them if the instant motion is granted,
22 Plaintiffs’ undue delaying in bringing this motion, and the futility of Plaintiffs’ new claims.

1 2. Undue Delay

2 When evaluating whether amendment will cause undue delay, the Court must
3 consider both -- whether the moving party has complied with the scheduling order, and -
4 - whether the moving party knew or should have known the facts and theories raised by
5 the amendment at the time of the original pleading. *AmerisourceBergen Corp. v.*
6 *Dialysist West, Inc.*, 465 F.3d 946, 953 (9th Cir. 2006). “Undue delay” is delay that
7 prejudices the nonmoving party or imposes unwarranted burdens on the court. *Wizards*
8 *of the Coast LLC*, 309 F.R.D. at 651-52.

9 Whether there has been “undue delay” should be considered in the context of (1)
10 the length of the delay measured from the time the moving party obtained relevant facts;
11 (2) whether discovery has closed; and (3) proximity to the trial date. *Texaco, Inc. v.*
12 *Ponsoldt*, 939 F.2d 794, 798–99 (9th Cir.1991).

13 This factor favors amendment. The Plaintiffs have been informed of the relevant
14 facts for more than a year while this case has been pending. Yet, new opinions from the
15 Ninth Circuit were published very recently, and this changes the Plaintiffs’ legal strategy.
16 Further, discovery is in the early stages and the current trial date is not scheduled for
17 another year.

18 The Court will issue a new scheduling order, after receiving an updated status
19 report from the parties, as indicated below.

20 3. Prejudice

21 When considering these factors, prejudice to the opposing party carries the most
22 weight. *Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 574 (9th Cir. 2020). In the
23 context of a motion to amend, prejudice means “undue difficulty in prosecuting a lawsuit
24

1 as a result of a change of tactics or theories on the part of the other party.” *Wizards of*
2 *the Coast LLC v. Cryptozoic Entm’t LLC*, 309 F.R.D. 645, 652 (W.D. Wash. 2015).

3 The party opposing amendment bears the burden of showing that they will be
4 unduly prejudiced by the amendment. *DCD Programs. Ltd. v. Leighton*, 833 F.2d 183,
5 187 (9th Cir. 1987). The party opposing amendment must do more than merely assert
6 prejudice, the party must show substantial prejudice. *Wizards of the Coast LLC*, 306
7 F.R.D. at 652 (citing *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079
8 (9th Cir. 1988)).

9 Granting Plaintiffs’ motion to amend causes further delay in the pretrial
10 deadlines, but does not necessarily entail additional litigation costs. While there may be
11 some prejudice, the Court does not find there has been undue prejudice to the
12 Defendants.

13 4. Futility of Amendment

14 Futility of amendment alone can justify the denial of a motion to amend. *Johnson*
15 *v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004). Leave to amend should only be denied
16 as futile when no set of facts can be proven under the amended pleading that would
17 constitute a valid claim. *Barahona v. Union Pac. R.R.*, 881 F.3d 1122, 1134 (9th Cir.
18 2018), *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988) (stating that the
19 standard for considering whether amendment would be futile is the same standard used
20 when considering the sufficiency of a pleading challenged under Rule 12(b)(6)).

21 The record shows that Plaintiffs’ proposed amendment to add a claim under 42
22 U.S.C. §1981 would, on summary judgment, inevitably fail. *Roth v. Garcia Marquez*, 942

1 F.2d 617, 629 (9th Cir.1991). As such, the Court finds this factor weighs against
2 amendment as to the Plaintiff's 42 U.S.C. §1981 claim.

3 Plaintiffs', in their proposed second amended complaint, allege "Defendants
4 violated 42 U.S.C. §1981 by engaging in religious discrimination against these
5 Plaintiffs." See 60-1 at ¶396. "It is well established, however, that § 1981 does not apply
6 to claims of religious discrimination." *Noyes v. Kelly Servs.*, 488 F.3d 1163, 1167 (9th
7 Cir. 2007). See also *Shah v. Mt. Zion Hospital & Medical Center*, 642 F.2d 268, 272 & n.
8 4 (9th Cir.1981) (noting that 42 U.S.C. § 1981 "only prohibits racial discrimination" and
9 not the other forms of discrimination protected under Title VII); *Hoke v. Symington*, 92
10 F.3d 1192 (9th Cir. 1996) (Similarly, to the extent Hoke's complaint could be construed
11 to allege a 42 U.S.C. § 1981 claim based upon defendants' interference with his right to
12 contract, this claim does not have an arguable basis in law or fact because Hoke did not
13 allege race-based discrimination).

14 Plaintiffs' Section 1981 claim, in this case, would be futile because they allege
15 discrimination on the basis of their religion, not their race.

16 5. Previous Amendments

17 The Court has broad discretion to deny leave to amend when a party has
18 previously sought to amend the complaint. *City of Los Angeles v. San Pedro Boat*
19 *Works*, 635 F.3d 440, 453 (9th Cir. 2011) ("the district court's discretion to deny leave to
20 amend is particularly broad where plaintiff has previously amended the complaint.")
21 (internal citation omitted).

22 This factor weighs against granting Plaintiffs leave to amend.
23
24

1 The Court GRANTS Plaintiffs' motion for leave to file a second amended
2 complaint to add Governor Jay Inslee and State Attorney General Robert Ferguson as
3 defendants, and to add new claims, including a 42 U.S.C. § 1985 conspiracy claim, a
4 constitutional Equal Protection claim, and requests for injunctive relief. The Court
5 GRANTS Plaintiffs' motion for leave to amend their breach of contract claim.

6 The parties should take note of the Court's Order Setting Forth Court Procedures
7 (Dkt. 32) for any future filings.

8 Plaintiffs are instructed to file and serve their second amended complaint no later
9 than September 20, 2024. The parties are directed to file an updated joint status report
10 and propose new pretrial deadlines, and a date range for a new trial date by September
11 27, 2024. Defendants should file an amended answer to Plaintiffs' second amended
12 complaint by October 18, 2024. Because new defendants are being added, the Clerk of
13 Court is directed to send the appropriate forms to the new defendants regarding the
14 option to consent to the Magistrate Judge's jurisdiction.

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16 Dated this 6th day of September, 2024.

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Theresa L. Fricke
20 United States Magistrate Judge